Supreme Court, U. S.
FILED
MAY 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1978

No. 78-1671

STATE OF NEW MEXICO, ex rel.
DODSON INSURANCE GROUP,
Appellant,

vs.

THE HONORABLE JAMES A. MALONEY,
JUDGE OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
Appellee.

On Appeal From
The Supreme Court of New Mexico

JURISDICTIONAL STATEMENT

May 4, 1979

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JURISDICTIONAL STATEMENT

Dodson Insurance Group (Dodson) appeals from the final judgment of the Supreme Court of New Mexico dated February 7, 1979, quashing the Alternative Writ of Superintending Control and denying the Petition for Writ of Prohibition, thereby upholding the validity of §52-1-34 N.M.S.A. 1978 pursuant to which statutory authority the trial judge ordered Dodson to pay Plaintiffs' costs of discovery, prior to any determination, preliminary or otherwise, that Dodson might be liable in the cause.

OPINIONS BELOW

The Supreme Court of New Mexico in entering its final judgment did not file an opinion, but a copy of the order quashing the Alternative Writ of Superintending Control and denying the Writ of Prohibition is appended hereto

at page 16, *infra*. The order of the trial judge for which Dodson sought the Writ of Prohibition or Writ of Superintending Control is also appended hereto at page 17, *infra*.

JURISDICTION

Plaintiffs filed suit against the New Mexico Restaurant Association and Dodson Insurance Group in Bernalillo County District Court under the New Mexico Workmen's Compensation Act, §§52-1-1 to 52-1-69 N.M.S.A. 1978. Subsequently, in an original proceeding before the New Mexico Supreme Court, Dodson sought a writ of prohibition or in the alternative a writ of superintending control to vacate an order of the District Court entered pursuant to §52-1-34 N.M.S.A. 1978, ordering Dodson to pay for Plaintiffs' discovery costs prior to any determination, preliminary or otherwise, as to Dodson's ultimate liability in the action. An Alternative Writ of Superintending Control was granted on January 11, 1979, but after receiving briefs and hearing oral arguments on the questions of constitutional law raised below, on February 7, 1979, the Supreme Court of New Mexico quashed the Alternative Writ previously granted, thereby upholding the validity of the statute in question, §52-1-34 N.M.S.A. 1978. On March 6, 1979, Notices of Appeal were filed in both the New Mexico Supreme Court and the Bernalillo County District Court (the trial court), appended hereto at pages 18 and 19, *infra*.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2). Prior decisions of the Court sustaining jurisdiction include *Fisher v. District Court of Sixteenth Judicial District*, 424 U.S. 382 (1976); *Cohen v. California*, 403 U.S. 15 (1971); *Pan American Petroleum Corporation v. Superior Court of Delaware in and for Newcastle County*, 366 U.S. 656 (1961); *Madruga v. Superior Court*, 346 U.S.

556 (1954); and *Bandini Petroleum Company v. Superior Court*, 284 U.S. 8 (1931).

The statute claimed to be unconstitutional by Dodson is Vol. 8, §52-1-34 at p. 70, N.M.S.A. 1978 [N.M.S.A. Vol. 9-1, §59-10-13.9 at pp. 191-92 (1953 Comp.)]. It reads:

> "The Rules of Civil Procedure for the District Courts and the Supreme Court Rules shall apply to all claims, actions, and appeals under the Workmen's Compensation Act [52-1-1 to 52-1-69 N.M.S.A. 1978] except where provisions of the Workmen's Compensation Act directly conflict with these rules, in which case the provisions of the Workmen's Compensation Act shall govern. It is provided, however, that any interrogatories, discovery procedures and depositions authorized by the Rules of Civil Procedure shall be had only after motion of one of the parties therefor and the court having jurisdiction finds, after due hearing, that good cause exists, that the evidence to be obtained will probably be material to the issues of the cause and the court enters an order authorizing the same. The cost and expense of any interrogatory, discovery procedure or deposition ordered by the court shall be paid by the defendants in the claim or action and in no event shall any unsuccessful claimant be responsible for the cost or expense of any interrogatory, discovery procedure or deposition ordered by the court."

Dodson contends that the statute violates the following pertinent provisions of the Fourteenth Amendment to the Constitution of the United States.

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

QUESTIONS PRESENTED

1. Whether §52-1-34 N.M.S.A. 1978 violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States when applied to compel a defendant in a workmen's compensation action, who has denied that it is in any way liable in the action, to pay for a plaintiff's discovery costs prior to any hearing or determination by the trial court that the defendant is or probably will be liable to plaintiff on the merits of the action.

2. Whether §52-1-34 N.M.S.A. 1978 violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States when applied so that the only defendants in New Mexico who are compelled to finance a plaintiff's discovery costs, prior to any hearing or determination by the trial court that the defendants are or probably will be liable to the plaintiff on the merits of the action, are defendants in workmen's compensation lawsuits.

3. Whether §52-1-34 N.M.S.A. 1978, when applied to compel a defendant in a workmen's compensation lawsuit to finance a plaintiff's discovery cost, prior to any hearing or determination by the trial court that the defendant is or probably will be held liable to the plaintiff on the merits of the action, chills the defendant's right of access to the courts in violation of the Fourteenth Amendment of the Constitution of the United States.

4. Whether §52-1-34 N.M.S.A. 1978, on its face, violates the above-mentioned provisions of the Fourteenth Amendment by compelling all defendants in workmen's compensation lawsuits to pay for the plaintiff's discovery costs, by providing that even successful defendants shall pay for the discovery costs incurred by unsuccessful plaintiffs, and by providing that no plaintiff shall ever be responsible for his own discovery costs.

STATEMENT OF THE CASE

On September 26, 1978, Plaintiffs filed a workmen's compensation complaint in the Second Judicial District Court in and for Bernalillo County, New Mexico, alleging that on April 13, 1978, Plaintiffs' decedent suffered an injury in the course and scope of his employment. Plaintiffs' decedent apparently contracted botulism while attending a banquet presumably sponsored by the New Mexico Advisory Council on Technical Vocational Education, of which decedent was chairman. The lawsuit, however, was filed not against the New Mexico Advisory Council on Technical Vocational Education, but against the New Mexico Restaurant Association and its workmen's compensation insurer, Dodson Insurance Group. The Answer filed by Defendants raised fourteen separate defenses and vigorously contested liability on both factual and legal grounds.

The statute here at issue requires that a party obtain authorization from the court before proceeding with discovery. On November 6, 1978, Plaintiffs filed a Motion for Discovery. At the hearing held on December 14, 1978, to decide whether the Plaintiffs should be permitted to proceed with discovery, Defendants objected to the entry of any discovery order authorizing the Plaintiffs to proceed with discovery if that discovery was to be at Dodson's cost and expense. The court did not consider whether Dodson was or probably would be held liable at the time of trial but only considered whether discovery was necessary, even though Dodson raised the issue and contended that the statute was unconstitutional in requiring Dodson to pay, prior to the entry of judgment, Plaintiffs' discovery cost.[1]

[1]Transcript of the hearing, identified as Exhibit E to the Petition for Writ of Superintending Control or in the alternative, for Writ of Prohibition contained in the records to be certified to the United States Supreme Court by the New Mexico Supreme Court. (Dodson has requested that the record be certified but has not yet received the numerical listing of documents.)

The trial court, nevertheless, not only granted Plaintiffs leave to proceed with discovery, but also specifically provided that such discovery should be at Dodson's cost and expense. A copy of the order entered by the District Court is appended hereto at page 17, *infra*.

Thereafter, on January 11, 1979, Dodson filed in the New Mexico Supreme Court their original proceeding petitioning for a Writ of Prohibition or Writ of Superintending Control. In the Petition, Dodson continued to press its constitutional objections to the statute, as evidenced by paragraph 12, page 4 of the Petition:

> A Writ of Prohibition or Writ of Superintending Control is required because the respondent would deprive the petitioner of its constitutional rights of due process under Amendment XIV of the Constitution of the United States and Section 18 of the Constitution of the State of New Mexico and to deprive the petitioner of equal protection of the law under said constitutional provisions.[2]

On January 11, 1979, the New Mexico Supreme Court granted an Alternative Writ of Superintending Control and set the matter for briefing and oral arguments. The focus of all briefs as well as the oral arguments held on February 7, 1979, was the claim that the statute at issue violated the due process clause, the equal protection clause and a defendant's right of access to the courts guaranteed by the Fourteenth Amendment of the United States Constitution.[3] At the conclusion of oral arguments and after deliberation by the New Mexico Supreme Court, the Alternative Writ was quashed as being "improvidently granted".

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[2]The Petition forms part of the New Mexico Supreme Court Record. See Footnote 1, supra.

[3]Record of the Supreme Court of New Mexico. See Footnote 1, supra.

At every step of the proceedings, whether before the District Court or the Supreme Court of the State of New Mexico, the constitutional questions were clearly raised by the Defendants. Although the order quashing the Writ of Superintending Control does not state one way or another whether the constitutional questions were decided by the New Mexico Supreme Court, the necessary effect of the decision by the New Mexico Supreme Court was to uphold the validity of the New Mexico statute and deny the claims of Defendants that the statute was unconstitutional. When the necessary effect of an action by a state supreme court is to uphold the validity of the statute at issue and to deny the claims of unconstitutionality presented by one of the parties, the requirements of 28 U.S.C. §1257(2) have been met and the Supreme Court has jurisdiction to consider the matter on the merits. *Cohen v. California, supra; Street v. New York*, 394 U.S. 576 (1969); *Atchison, Topeka & Santa Fe Railway Company v. P.V.C.*, 346 U.S. 346 (1953); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928), (cited with approval in *Street, supra*); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Kansas City Southern Railway Co. v. Road Improvement District 6 of Little River County, Ark.*, 256 U.S. 658 (1921).

That the necessary effect of the denial of the writ was to uphold the validity of the statute is clear. Absent the statutory authorization, the trial court had no power to enter an order compelling Dodson to pay Plaintiffs' discovery costs and expenses prior to the trial on the merits. *Read v. Western Farm Bureau*, 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977). *See also* the New Mexico Rules of Civil Procedure that are essentially identical to the Federal Rules of Civil Procedure. By refusing to grant the writ, the New Mexico Supreme Court upheld the order of the trial court that had been entered pursuant to §52-1-34 thereby uphold-

ing its validity. The writ was timely filed and the attacks on §52-1-34 were properly presented.

It is doubtful that Dodson may ever obtain a meaningful review of the trial court's action. As the prevailing party at the trial, Dodson would probably not have a right to appeal. Even if that right does exist, the appeal could not undo the harm already done for as this court recently held, even temporary deprivations of property are proscribed by the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972). No doubt the New Mexico Supreme Court would correct a violation of fundamental constitutional rights on a petition for a writ if later appeals could not correct the error. Only by issuing the writ could the New Mexico Courts avoid this result; the denial of the writ implicitly upheld the validity of the statute.

The necessary effect of a denial of a writ when a party attacks on constitutional grounds a statute such as §52-1-34 that confers powers upon a court, is to hold that the statute does not violate the constitution in its grant of jurisdiction or power to act. Writs of prohibition, while at one time regarded as discretionary, have become mandatory when the trial court has no jurisdiction. *State ex rel. Transcontiental Bus Service v. Carmody*, 53 N.M. 367, 370, 208 P.2d 1073 (1949); *State Game Commission v. Tackett*, 71 N.M. 400, 379 P.2d 54 (1962). Actions by a court that exceed the bounds established by the constitution are acts in excess of jurisdiction for which a writ of prohibition will lie. *State ex rel. Hannah v. Armijo*, 37 N.M. 423, 24 P.2d 274 (1933); *Board of Commissioners of Guadalupe County v. District Court*, 29 N.M. 244, 233 Pac. 516 (1924). The writ is particularly appropriate when the action violates a defendant's right to due process and goes directly to a court's subject matter jurisdiction to enter a particular order. *See State ex*

rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933). By denying the writ the New Mexico Court necessarily held, therefore, that the statute violated no principles of constitutional law.

Certainly Dodson has contended in every proceeding that the enforcement of §52-1-34 by the District Court violated fundamental rights, violated due process rights, and violated the equal protection rights guaranteed by the Constitution. The cases are clear that when a court threatens to act in violation of these rights, the obligation of the New Mexico Supreme Court to issue the writ of prohibition is mandatory.

The only way the New Mexico Supreme Court could deny the writ of prohibition would be to hold that there had been no violation of the constitution affecting fundamental rights and that the constitution does not prohibit a legislature from granting a court power to take property from a defendant without hearing to pay for a plaintiff's discovery even though that plaintiff may be entitled to no compensation whatsoever from the defendant at the time of trial. The absence of a record specifying the reasons for the decision of the New Mexico Supreme Court fails to detract from the jurisdiction of the Court. The "necessary effect" of the denial of the writ, therefore, was to uphold the validity of the statute.

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Pursuant to the doctrines expressed in *Fusari v. Steinberg*, 419 U.S. 379 (1975) Dodson would inform the court of matters occurring subsequent to the filing of the Notices of Appeal although Dodson is of the opinion that the matters to be presented are irrelevant to the jurisdiction of the court. The day following the filing of the Notices of Appeal, Plaintiffs attempted to moot the appeal by asking

the trial court to recognize a withdrawal of their Motion for Discovery, requesting the trial court to vacate the discovery order, and further moving the trial court to lift its stay order pending the resolution of this appeal to the Supreme Court. The trial court granted these requests on March 12, 1979, six days after the Notices of Appeal were filed.

At that point, Dodson again petitioned the New Mexico Supreme Court for a writ of prohibition vacating the March 12 order which had recognized the withdrawal of the discovery motion, vacated the discovery order and lifted the stay of proceedings pending the outcome of this appeal. The Alternative Writ of Prohibition was granted on March 21, 1979. Following briefing and oral arguments, the New Mexico Supreme Court made the Alternative Writ of Prohibition permanent on April 18, 1979. This writ assured that the case would be preserved in the status it held as of the time the Notices of Appeal were filed. Dodson Insurance Group is still under court order to pay for Plaintiffs' discovery, Plaintiffs have not yet been permitted to withdraw their motion for discovery, the stay of proceedings pending the resolution of this appeal is still in effect, and the parties are properly before the Court.

The situation is analagous to *Kerr v. United States District Court*, 426 U.S. 394 (1975), footnotes 4 and 5, in which the Court recognized the possibility of yet another reversal in position by the plaintiffs and therefore denied the claim of mootness, even though the plaintiffs had offered to withdraw their request for production. In *United States v. Concentrated Phosphate Export Association*, 393 U.S. 197, 203 (1968) the Court pointed out that if the Court held the case moot the defendant would be "free to return to his old ways," even though that defendant had at that time voluntarily ceased the illegal conduct.

Furthermore, as pointed out at page 8, *supra*, if Dodson wins the case on the merits and receives the relief requested in its Answer, as the prevailing party it is doubtful that a meaningful review of the discovery order could be obtained. The case therefore is one "capable of repetition but evading review." *Dunn v. Blumstein*, 405 U.S. 330, 333 (1972); *Roe v. Wade*, 410 U.S. 113, 125 (1973). Without this appeal, Dodson may never obtain proper review of the violation of its constitutional rights.

Because of the continuing activities of Dodson as a workmen's compensation insurer in New Mexico, the question is one agitated by its persisting programs as an insurer. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968). When the continuing effect of the trial court's order is combined with the probability of yet another reversal by Plaintiffs and the persistance of the question by reason of Dodson's activities as a workmen's compensation insurer, it is clear that this case presents a justiciable controversy mandating review by this Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The cases previously cited to sustain jurisdiction are cases in which the Court has recognized that the granting or denying of writs or prohibition or superintending control in original proceedings before state supreme courts are final judgments subject to review under 28 U.S.C. §1257(2). The original proceeding in this cause, in the New Mexico Supreme Court, was just such a proceeding and the final judgment of the New Mexico Supreme Court quashing the Alternative Writ of Superintending Control and thereby denying the Writ of Prohibition fits squarely within the definition of finality used in the cases cited. The Statement of the Case demonstrated the adequate presentation of a

federal question and confirmed the absence of adequate state grounds that would otherwise interfere with the exercise of this Court's jurisdiction.

Although certain constitutional principles are well recognized, their applicability to discovery costs in workmen's compensation litigation has not been decided.[4] The necessity of judicial hearings prior to a deprivation of property has been well recognized in garnishments, *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969); *North Georgia Finishing Inc. v. Dichen, Inc.*, 419 U.S. 601 (1975), the revocation of drivers' licenses, *Bell v. Burson*, 402 U.S. 535 (1971); and replevin, *Fuentes v. Shevin*, 407 U.S. 67 (1972). Equally well established is the principle that a "fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Grannis v. Ordean*, 234 U.S. 385, 394 (1913).

In this case the trial court entered its order compelling Defendant to pay Plaintiffs' discovery costs without the benefit of a hearing, preliminary or final, on the Defendants' ultimate liability. The hearing held by the trial court went only to Plaintiff's need to conduct the discovery. Liability is a prerequisite in New Mexico to the award of medical expenses, *State ex rel. J. P. (Bum) Gibbons v. District Court*, 65 N.M. 1, 330 P.2d 964 (1958), attorneys' fees, *Scott v. Southwestern Tankers, Inc.*, 73 N.M. 219, 387 P.2d 327 (1963) and workmen's compensation benefits, §52-1-9 N.M.S.A. 1978, but §52-1-34 ignores that scheme of liability in compelling all defendants to pay the expenses of a plaintiff's discovery steps. Under the line of cases commencing with *Sniadach, etc., supra*, neither the courts nor the statute at issue may ignore that question of liability in depriving Dodson of its property. The question now raised is whether the rationale of these cases can be extended to workmen's compensation litigation.

[4]The New Mexico Supreme Court ruled that the use of workmen's compensation boards violate the New Mexico Constitution so all workmen's compensation actions are heard by the district courts. Expressions by this Court of principles pertaining to civil actions would, therefore apply to New Mexico workmen's compensation actions. *State ex rel. Hovey Concrete Products Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957).

In other decisions, framed "in light of cases that delimit rights of defendants compelled to litigate their differences in a judicial forum," this Court has acknowledged that the Fourteenth Amendment also encompasses the right of free and unchilled access to the courts. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *Bounds v. Smith*, 430 U.S. 817 (1977). This court, however, has not determined if the broad and all inclusive obligation of a defendant in a New Mexico workmen's compensation action to pay for all of a plaintiff's discovery costs, even when a defendant is the ultimate victor at trial, chills the defendant's right to litigate his differences with the plaintiff. If the New Mexico Supreme Court denial of the Writ of Prohibition is permitted to stand, a defendant would be forced to finance a plaintiff's lawsuit even though the defendant knows that the lawsuit is frivolous, without merit, and unworthy of serious consideration. The nuisance value of such lawsuits would assume an entirely new complexion and would transform the cases from nuisances into substantial threats.

For decades the states have assumed that they may treat defendants in workmen's compensation or wage earning cases different from other defendants. See, *e.g., Missouri, Kansas & Texas Railway Co. of Texas v. Cade*, 233 U.S. 642 (1914). Dodson does not attack this basic distinction. The rationale behind those cases, however, has been that an *unsuccessful* defendant should bear the burden

of contesting liability of a claim ultimately found to be just and proper. In this case, if the rulings are permitted to stand, the legislation penalizes defendants who *successfully* prove the absence of liability against them. For asserting their rights and contesting invalid claims, the statute punishes otherwise successful defendants. There is no rational justification for the existence of this law.

CONCLUSION

Whether this Court refers to the statute on its face or to its application by the trial court, the denial of the writ of prohibition by the New Mexico Supreme Court contravenes fundamental constitutional rights. Dodson should be given an opportunity to prove that principles of constitutional law previously applied to analagous cases hold equal persuasion to the facts at hand.

For these reasons, Appellant, Dodson Insurance Group, respectfully requests the Court to note probable jurisdiction, to set the matter for full briefing, and to permit oral arguments.

Respectfully submitted.

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I hereby certify pursuant to Supreme Court Rule 33(3) (a) that on the Fourth day of May, 1979, I caused three copies of the foregoing to be hand delivered to Ronald Segel, 600 First Plaza, Albuquerque, New Mexico; The Honorable James E. Maloney, Bernalillo County Courthouse, Albuquerque, New Mexico; and Harold Parker, 1300 Bank of New Mexico Building, Albuquerque, New Mexico, and that all parties required to be served have been served.

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